

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR

Appellant,

v.

STATE OF NEW MEXICO, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICUS CURIAE STATE OF IDAHO

WAYNE L. KIDWELL, ATTORNEY GENERAL
WARREN FELTON, DEPUTY ATTORNEY GENERAL

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JURISDICTION

The jurisdictional statement of the State of New Mexico is here adopted.

CONSENT

The State of Idaho has obtained written consent from both of the parties hereto, and we notice that such consent is unnecessary as to a state attorney general appearing on behalf of the state under the rules of the Supreme Court, Rule 42, ¶4.

INTEREST OF THE STATE OF IDAHO AS AMICUS CURIAE

Idaho's interest in this matter relates to the possibility of the state's continued exercise of the state police powers in relation to Amendment 10 of the United States Constitution; that is, continued enforcement of various of its laws such as laws relating to brand inspection under Chapters 11, 12, 13, and 14 of Title 25 of the *Idaho Code;* animal disease control and quarantine laws, Chapters 1 through 6, Title 25, *Idaho Code;* fish and game laws, Title 36, *Idaho Code;* and indeed as will be further developed in the argument, enforcement of its laws in general, both civil and criminal in relation to persons on federal land in Idaho.

Idaho also, as both New Mexico and Nevada, is faced with the questions raised by New Mexico and Nevada in their briefs and jurisdictional statements as to continued enforcement of the Wild Free-Roaming Horse and Burro Act by the Department of Interior, 85 Stat. 649, 16 U.S.C. (Supp. 3) 1331 as reproduced in Appendix F of Appellee's jurisdictional statement.

ARGUMENT

In this short brief, we will attempt to avoid useless recitation of the points and authorities already established by the State of New Mexico and the State of Nevada. We agree with them.

We do, however, feel that a few of the possible consequences

of a decision in favor of the Department of Interior in this matter should be emphasized.

In this case, much, much more is at issue than the validity of the Wild Free-Roaming Horse and Burro Act, supra. If the Department of Interior is successful in this matter we believe that the way is then open for eventual and complete erosion of any state jurisdiction over its citizens and persons generally on federally-owned lands. We refer particularly to laws such as brand inspection laws, animal disease control laws, fish and game laws, and ultimately, even the control of the state over its citizens on federally-owned lands in matters of general criminal and civil law could be taken away from the western states under the guise of federal control of its property in relation to the property clause of the United States Constitution, Article 4, Section 3.

The Idaho Admission Bill, 26 Stat. 215, Ch. 656, reads as follows:

* * *

> Whereas, said convention and the people of said territory have asked the admission of said territory into the Union of States on an equal footing with the original states in all respects whatever. Therefore,
>
> §1. The state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; . . .

This Court has for many years dealt with the matter of regulation of wild animals and fish and game within the state, and having little or no direct effect on interstate commerce, as a state matter falling exclusively within the state police powers. *McCready v. Virginia,* 94 U.S. 391 (1877); *Geer v. State of*

Connecticut, 161 U.S. 519 (1886)[1]; *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924). In the *Geer* case at 161 U.S. 533, the court quoted with approval from *Magner v. People*, 97 Ill. 320:

> . . . so far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish . . . It is perhaps accurate to say that the ownership of the sovereign authority is in trust for all of the people of the state . . .

Also, the *Lacoste v. Department of Conservation*, supra., case makes a very strong statement of the same principal. So far as we can learn, this principle has never been overruled.

As clearly set forth by the State of New Mexico in its brief on the Motion to Dismiss or Affirm the decree below, pages 9-11, the federal government's abilities under the Property Clause relate to management and protection of its property. The mere fact that an animal comes upon federal property does not and cannot, in and of itself, convert that animal forever after into an

[1]An interesting side light to the *Geer* case, supra, is that it overrules an earlier Idaho territorial case, *Territory v. Evans*, 2 Idaho 658 (Hasbrouck), 2 Idaho 634 (West Publishing Co.), 7 L.R.A. 288 (1890). On page 161, U.S. 534, the Supreme Court stated:

> . . . it was held that a state law prohibiting the shipment outside of the state of game killed therein violated the interstate commerce clause of the Constitution of the United States, but the reasoning which controlled the decision of these cases, we think, *inconclusive*, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines and the consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest.

From this, it can be seen that in the *Geer* case even though the law in question in the *Geer* case prohibited shipment of game out of state, the Court did not consider, in that case, that the Interstate Commerce Clause of the U.S. Constitution was involved. This may or may not be the law now, however, it certainly shows the extent to which the Supreme Court has gone to uphold states rights as to wild animals.

animal subject exclusively to federal protection throughout its lifetime. If such were the case under this same guise, any person having once ventured on to federally-owned land might thereafter for all time be declared to be part of the federal lands and "federal man" subject only to federal law to the absolute exclusion of all state law, whether or not the person thereafter remained on federal soil. This cannot be so. To go one step further, in fact the horses or burros under the act in question do not even need to step on federal land at all, under Sections 3 and 8 of the Act, in order to come within most of its terms.

Of course, this is a ridiculous and an absurd example. However, the Act in question here proceeds to claim and take absolute and continuing jurisdiction over all wild and free-roaming horses and burros upon just such a basis and declares them to be part of the land as follows:

Wild Free-Roaming Horses and Burros Act, supra

PREAMBLE

* * *

Wild and free-roaming horses and burros shall be protected from capture, branding, harrassment or death and to accomplish this, they are to be considered in the area where presently found as an integral part of the natural system of the public lands . . .

Section 3 . . . All wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the secretary for the purpose of management and protection in accordance with the provisions of this act . . .

Section 8. Any person who—

(1) wilfully removes or attempts to remove a wild

free-roaming horse or burro from the public lands, without authority of the secretary, or

(2) converts a wild free-roaming horse or burro to private use, without authority from the secretary, or

(3) maliciously causes the death or harrassment of any wild free-roaming horse or burro, or

(4) processes or permits to be processed into commercial products the remains of a wild free-roaming horse or burro, or

(5) sells, directly or indirectly, a wild free-roaming horse or burro maintained on private or leased land pursuant to Section 4 of this act, or the remains thereof, or

(6) wilfully violates a regulation issued pursuant to this Act, . . .

The Act then goes on to provide for fine and imprisonment. It should be noticed that the only provision of Section 8 limited to the public lands is subdivision (1) thereof. All of the rest of the above-quoted provisions claim absolute and complete jurisdiction over all wild free-roaming horses or burros wherever they may be within this country. This law is not based upon the Federal Interstate Commerce Clause, U.S. Constitution, Article 1, Section 8, Clause 3.

In the Appendix to the June, 1974 *Inventory Report on Real Property Owned by the United States Throughout the World*, prepared by General Services Administration, GS 1.15, 1974, 559A will be found tables showing federal ownership of land within the states, state by state. We include these tables in Appendix A and B here to emphasize and show the extent of federal ownership of lands in the various states, particularly in

the western states and the far-reaching effect such a decision as this could have. In the first table in Appendix A appear acreage figures for federally-owned lands, state by state, as well as total acreage for each state and percentage of federally-owned lands. Footnote 2 of the table indicates that trust lands are not included. No issue is made here as to jurisdiction over trust lands. However, that table is included in Appendix B to further show and emphasize the true federal ownership picture. For instance, as to New Mexico, 6,894,984.4 acres are held in trust by the federal government. As to Nevada, 1,143,290 acres are held in trust by the federal government. As to Idaho, 786,445 acres are held in trust by the federal government. Except for Texas, as to the western states, a good percentage and indeed in many cases a majority of the lands are owned or held by the federal government.

An excellent history and historical view of the wild horse in America can be obtained from the book "*The Wild Horse of the West*" by Dr. Walker D. Wyman, written in 1945 and published in 1945 and 1946.[2] From this book, it is apparent that if by wild horse, you mean the old mustang that gained freedom from the Spaniards 300-400 years ago, you are talking about a small horse, almost a pony, ranging from 10-14 hands, and from 650-900 pounds. This animal actually no longer exists, or only exists in very small numbers in isolated places. See for instance, Chapter 7 at page 132, Chapter 9 at page 165, and Chapters 14 and 15, pages 275-315. Dr. Wyman's book is well-written and contains a large bibliography and is well documented. In summarizing the book and as the last paragraph therein, he includes the following:

The little pony left his stamp not only on the hearts of the

---

[2]*The Wild Horse of the West*, Dr. Walker D. Wyman, Library of Congress, No. 42W98, S.F. 293.M9W9, 636.168, 1945-1946 — Caxton Printers, Caldwell, Idaho.

West and on the Western cow pony but also on geography. Several states have a "Wild Horse Plains," or "Wild Horse Mesa." In Texas there are twenty-seven "Mustang Creeks," and a town called "Mustang" in Culbertson County. If the mustang as he once was, a definite horse type with his long mane and tail, his protruding eyes, his bulky head, had been threatened with extermination in 1940, Congress would have rushed to his aid, appropriated money for his preservation. But that horse is gone. If the diluted horse found in the West as late as 1900 were today threatened with destruction, cowboys, Congressmen, and the rest of America would have raised voices against it. But that horse, too, is gone. Rather than preserve degenerate estrays, it is better to look backward to that which once was, and cease thinking of perpetuating that which does not exist. Texas has the idea. Build a statue to the horse that used to be, make it life size, include a stallion, some mares, and a few colts. Let this bronze symbol stand in a public place so that generations that are to come may see the type of horse that contributed the base stock to the Western range horse industry. And on this statue carve a caption taken from a letter to **Life** protesting the destruction of the wild horse herds in recent years: 'Son, that is what was once known as the Western pony.'

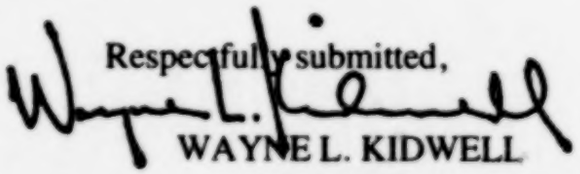
Dr. Wyman carefully documents in his book the fact that the wild mustang probably is no longer in existence to any greater extent than the buffalo. The horses presently running free are generally horses that have escaped or gained their freedom from ranchers and farmers. They are larger, better bred stock than was the mustang. We do not contend that these horses should be treated cruelly, or that they should be maimed or run to death. We feel, however, that a different type of law than the Wild Free-Roaming Horse and Burro Act could and should be used to

carry out such a purpose and that this should be done by the states.

CONCLUSION

The decision of the three-judge court below should be upheld. The appeal should either be dismissed or that decision should be affirmed.

Respectfully submitted,



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APPENDIX A

TABLE 4 — *Comparison of federally owned land with total acreage of States*

State	Acreaged owned by the Federal Government: Public domain	Acreaged owned by the Federal Government: Acquired by other methods	Acreaged owned by the Federal Government: Total	Acreage now owned by Federal Government	Acreage of State[1]	Percent owned by Government[2]
Alabama	29,291.6	1,086,079.5	1,115,371.1	31,563,028.9	32,678,400	3.413
Alaska	352,424,112.1	18,117.1	352,442,229.2	13,039,379.8	365,481,600	96.432
Arizona	31,641,588.6	307,120.8	31,948,709.4	40,739,290.6	72,688,000	43,953
Arkansas	1,068,140.0	2,134,858.0	3,202,998.0	30,396,362.0	33,599,360	9.533
California	42,672,037.9	2,448,099.2	45,120,137.1	55,086,582.9	100,206,720	45.027
Colorado	22,897,826.8	1,075,622.8	23,973,449.6	42,512,310.4	66,485,760	36.058
Connecticut	0	9,514.8	9,514.8	3,125,845.2	3,135,360	.304
Delaware	0	38,594.7	38,594.7	1,227,325.3	1,265,920	3.049
District of Columbia	0	10,203.2	10,203.2	28,836.8	39,040	26.135
Florida	370,675.2	3,051,912.2	3,422,587.4	31,208,692.6	34,721,280	9.857
Georgia	0	2,215,297.2	2,215,297.2	35,080,062.8	37,295,360	5.940
Hawaii	33,287.1	384,537.0	417,824.1	3,687,775.9	4,105,600	10.177
Idaho	32,935,020.2	797,799.9	33,732,820.1	19,200,299.9	52,933,120	63.727
Illinois	437.2	560,948.3	561,385.5	35,233,814.5	35,795,200	1.568
Indiana	432.0	481,296.5	481,728.5	22,676,671.5	23,158,400	2.080
Iowa	340.8	223,434.9	223,775.7	35,636,704.3	35,860,480	.624
Kansas	26,380.8	679,687.7	706,068.5	51,804,651.5	52,510,720	1.345
Kentucky	0	1,348,022.3	1,348,022.3	24,164,297.7	25,512,320	5.284
Lousiana	25,007.3	1,050,230.4	1,075,237.7	27,792,602.3	28,867.840	3.725
Maine	0	130,723.8	130,723.8	19,716,956.2	19,847,680	.659
Maryland	0	200,482.0	200,482.0	6,118,878.0	6,319,360	3.173
Massachusetts	0	74,742.2	74,742.2	4,960,137.8	5,034,880	1.485
Michigan	295,602.7	3,093,946.4	3,389,549.1	33,102,610.9	36,492,160	9.288
Minnesota	1,264,096.3	2,094,073.4	3,358,169.7	47,847,590.3	51,205,760	6.558
Mississippi	66,703.1	1,579,698.6	1,646,401.7	28,576,318.3	30,222,720	5.448
Missouri	2,647.3	2,084,178.5	2,086,825.8	42,161,494.2	44,248,320	4.716
Montana	25,182,924.3	2,468,124.7	27,651,049.0	65,619,991.0	93,271,040	29.646
Nebraska	244,555.5	448,612.4	693,167.9	48,338,512.1	49,031,680	1.414
Nevada	60,594,232.3	180,295.5	60,774,527.8	9,489,792.2	70,264,320	86.494
New Hampshire	0	710,073.0	710,073.0	5,058,887.0	5,768,960	12.309
New Jersey	0	130,928.6	130,928.6	4,682,511.4	4,813,440	2.720
New Mexico	24,262,895.0	1,828,756.7	26,091,651.7	51,674,748.3	77,766,400	33.551
New York	0	245,553.4	245,553.4	30,435,406.6	30,680,960	.800
North Carolina	0	1,952,391.7	1,952,391.7	29,450,488.3	31,402,880	6.217
North Dakota	209,122.5	2,099,483.0	2,308,605.5	42,143,874.5	44,452,480	5.193
Ohio	85.5	327,706.9	327,792.4	25,894,287.6	26,222,080	1.250
Oklahoma	150,795.1	1,386,087.4	1,536,882.5	42,550,797.5	44,087,680	3.486
Oregon	30,998,441.7	1,235,868.1	32,234,309.8	29,364,410.2	61,598,720	52.330
Pennsylvania	0	656,646.1	656,646.1	28,147,833.9	28,804,480	2.280
Rhode Island	0	7,108.9	7,108.9	670,011.1	677,120	1.050
South Carolina	1,597,317.3	1,692,940.8	3,290,258.1	45,591,661.9	48,881,920	6.731
South Dakota	1,597,317.3	1,692,940.8	3,290,258.1	45,591,661.9	48,881,920	6.731
Tennessee	0	1,781,705.2	1,781,705.2	24,945,974.8	26,727,680	6.666
Texas	0	3,178,049.2	3,178,049.2	165,039,550.8	168,217,600	1.889
Utah	34,335,336.9	547,122.7	34,882,459.6	17,814,500.4	52,696,960	66.194
Vermont	0	274,376.9	274,376.9	5,662,263.1	5,936,640	4.622
Virginia	0	2,348,859.2	2,348,859.2	23,147,460.8	25,496,320	9.213
Washington	11,153,063.3	1,423,429.8	12,576,493.1	30,117,266.9	42,693,760	29.458
West Virginia	0	1,066,567.7	1,066,567.7	14,343,992.3	15,410,560	6.921
Wisconsin	10,292.4	1,800,077.5	1,810,369.9	33,200,830.1	35,011,200	5.171
Wyoming	29,320,367.8	607,493.5	29,927,861.3	32,415,178.7	62,343,040	48.005
Total	703,813,056.6	56,719,118.1	760,532,174.7	1,510,811,185.3	2,271,343,360	33.484

[1]Source: U.S. Census of Population

[2]Excludes trust properties.

APPENDIX B

TABLE 10 — *Trust properties in custody of the Federal Government, by agency and state*

State	Total, all agencies				Interior			Smithsonian Institution			Health, Education and Welfare		
	No. of installations	Acres	No. of buildings	No. of installations	Acres	No. of buildings	No. of installations	Acres	No. of buildings	No. of installations	Acres	No. of buildings
Alaska	6	106,115.5	0	6	106,115.5	0	0	0	0	0	0	0
Arizona	58	19,531,502.0	0	25	19,531,343.7	0	0	0	0	33	158.3	0
California	80	543,870.2	0	79	543,867.6	0	0	0	0	1	2.6	0
Colorado	3	755,002.8	0	3	755,002.8	0	0	0	0	0	0	0
District of Columbia	1	312.9	25	0	0	0	1	312.9	25	0	0	0
Florida	3	79,014.1	0	3	79,014.1	0	0	0	0	0	0	0
Idaho	6	786,445.0	26	6	786,445.0	26	0	0	0	0	0	0
Iowa	2	4,132.8	0	2	4,132.8	0	0	0	0	0	0	0
Kansas	6	26,155.6	8	6	26,155.6	8	0	0	0	0	0	0
Lousiana	1	262.2	0	1	262.2	0	0	0	0	0	0	0
Maryland	1	21.0	22	0	0	0	1	21.0	22	0	0	0
Michigan	6	17,180.8	0	6	17,180.8	0	0	0	0	0	0	0
Minnesota	16	734,641.4	0	14	734,618.1	0	0	0	0	2	23.3	0
Mississippi	1	17,382.4	0	1	17,382.4	0	0	0	0	0	0	0
Missouri	1	374.5	0	1	374.5	0	0	0	0	0	0	0
Montana	18	5,120,459.8	0	12	5,120,435.5	0	0	0	0	6	24.3	0
Nebraska	9	61,469.7	0	8	61,459.9	0	0	0	0	1	9.8	0
Nevada	30	1,143,290.0	0	27	1,143,270.1	0	0	0	0	3	19.9	0
New Mexico	38	6,894,989.4	0	28	6,894,939.9	0	0	0	0	10	49.5	0
North Carolina	2	56,443.8	2	2	56,443.8	2	0	0	0	0	0	0
North Dakota	10	843,552.4	0	8	843,538.5	0	0	0	0	2	13.9	0
Oklahoma	24	1,295,714.2	33	22	1,295,695.1	33	0	0	0	2	19.1	0
Oregon	8	761,079.0	7	7	761,078.1	7	0	0	0	1	.9	0
South Dakota	19	4,869,793.2	20	14	4,869,651.4	20	0	0	0	5	141.8	0
Utah	8	2,274,351.4	0	7	2,274,351.2	0	0	0	0	1	.2	0
Washington	29	2,482,303.4	1	27	2,482,301.1	1	0	0	0	2	2.3	0
Wisconsin	10	161,345.3	0	10	161,345.3	0	0	0	0	0	0	0
Wyoming	2	1,885,035.1	0	1	1,885,032.4	0	0	0	0	1	2.7	0
Total	398	50,452,230.9	144	326	50,451,437.4	97	2	333.9	47	70	408.6	0